Restroom Use, Civil Rights, and Free Speech "Opportunism"

TIMOTHY ZICK*

Commentators have expressed concerns that litigants are invoking the First Amendment's Free Speech Clause strategically, in order to compensate for the weakness or futility of other constitutional claims. The phenomenon has been given a label—"opportunism"—and scholars have examined some of its causes and consequences. This Article takes a closer and somewhat skeptical look at the concept of free speech "opportunism." It imagines that the Free Speech Clause will be invoked in challenges to laws or policies that restrict public restroom use based on a person's gender. Would such challenges be "opportunistic," as the term has been defined? What would such claims tell us about the causes and consequences of invoking the Free Speech Clause, particularly in situations where it appears to be a second-best claim? Drawing lessons from the restroom example, as well as the broader civil rights free speech tradition, the Article argues for greater precision and caution when affixing the "opportunism" label. It also contends that while strategic free speech claims could produce certain costs, they might also produce some underappreciated benefits. Ultimately, the Article suggests that criticisms of particular litigants or claims seem misdirected. The real concern appears to be the substance of free speech doctrines and theories. These facilitate free speech entrepreneurism, but may also produce an expansionist Free Speech Clause that subordinates and supplants other constitutional rights.

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* Mills E. Godwin, Jr. Professor of Law, William & Mary Law School. I would like to thank the participants who attended "The Expanding First Amendment" Symposium at The Ohio State University Moritz College of Law. I would also like to thank the students who organized the Symposium and worked so diligently on my Article.

I. INTRODUCTION

At a First Amendment symposium I organized a few years ago, a foreboding darkness hung over the subject of the Free Speech Clause.[1] Speaker after speaker rose to argue that litigants were aggressively and strategically invoking the Free Speech Clause, with the result that the clause was trespassing in places it did not belong. Scholars worried that as a result of these invocations, the Free Speech Clause's boundaries and principles were being warped. They argued that we needed to get a grip on the Free Speech Clause before it swallowed up everything in its path, from professional licensing regulations, to commercial laws, to data privacy laws, to pharmaceutical disclosure requirements.

The tone of the discussion was set by Professor Fred Schauer's presentation, which reprised the prospect, raised in some of his earlier work, that in the absence of a proper "hammer" to beat back commercial and other government regulations, the Free Speech Clause was being used as an ill-fitting but sometimes effective "pipe wrench."[2] This, in essence, is how Professor Schauer defines "First Amendment opportunism"—invoking a "plausibly effective but ill-fitting" First Amendment to do a job better suited to the Equal Protection Clause, the Due Process Clause, or some other constitutional provision.[3] Although Professor Schauer appears to stop short of declaring that "opportunism" is a pejorative label, he and other scholars have argued that the phenomenon carries serious risks—to the central values of the Free Speech

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[1] The symposium contributions were published in *The Contemporary First Amendment: Freedom of Speech, Press, and Assembly Symposium*, 56 WM. & MARY L. REV. 1029 (2015). The symposium's tone was no anomaly. Other scholars have also criticized the path that free speech precedents and doctrines have recently taken. *See, e.g.*, STEVEN H. SHIFFRIN, WHAT'S WRONG WITH THE FIRST AMENDMENT? (2016).

[2] *See* Frederick Schauer, *The Politics and Incentives of First Amendment Coverage*, 56 WM. & MARY L. REV. 1613, 1614–17 (2015) [hereinafter Schauer, *Politics and Incentives*]; *see also* Frederick Schauer, *First Amendment Opportunism*, *in* ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 174, 175 (Lee C. Bollinger & Geoffrey R. Stone eds., 2002) [hereinafter Schauer, *First Amendment Opportunism*] (using the hammer and pipe wrench analogy).

[3] Schauer, *First Amendment Opportunism*, *supra* note 2, at 175–76. Although Schauer refers generally to the "First Amendment," his examples and analysis show that it is actually the Free Speech Clause—i.e., not the Press Clause, Assembly Clause, or Petition Clause—that is being invoked in a manner that he deems "opportunistic." Thus, I will refer in this Article to "free speech opportunism."

Clause, to free speech doctrine and theory, and even to the prospects for American self-government.[4]

These concerns are motivated by authentic desires to preserve coverage and protection for speech that is truly vital to objects at the core of the modern Free Speech Clause—in particular, political discourse. Still, it seemed to me then, as it does now, that the label "opportunism" might sweep too broadly and suggest a pejoratism that is unwarranted, at least in certain contexts and cases. Simply put, strategic, enterprising, or what we might call "entrepreneurial" invocations of the Free Speech Clause are not always or necessarily bad or undesirable. Indeed, to some degree, the modern Free Speech Clause is deeply rooted in just these sorts of claims.

Most of the literature and commentary concerning free speech opportunism has focused on commercial litigants, who are purportedly (mis-)using the Free Speech Clause as a deregulatory tool.[5] I want to direct attention to a different context. Broadly speaking, my Article focuses on the category of civil rights claims. It begins with a claim that has yet to arise, but seems to meet the basic definition of "free speech opportunism."[6] Some states have passed but repealed, while others are actively considering, laws or policies that would restrict public restroom use based on a person's gender.[7] It seems likely that at some point a state or locality will restrict restroom use in this manner. It is also a given that challengers will file suit to enjoin enforcement of any such provision. It is less certain whether the Free Speech Clause will be invoked in such cases.[8]

Let us suppose that it will be. Would such an invocation be "opportunistic"? What standards or factors would assist us in making that determination? And what would such invocations tell us about the causes and consequences of using the Free Speech Clause to advance what would seem to be a constitutional equality claim or movement?

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[4] *See, e.g.*, Amanda Shanor, *The New* Lochner, 2016 WIS. L. REV. 133, 133 (2016); Morgan N. Weiland, *Expanding the Periphery and Threatening the Core: The Ascendant Libertarian Speech Tradition*, 69 STAN. L. REV. 1389, 1390 (2017).

[5] *See, e.g.*, Shanor, *supra* note 4, at 134.

[6] *See generally* Schauer, *First Amendment Opportunism*, *supra* note 2, at 176.

[7] *E.g.*, Public Facilities Privacy & Security Act ("House Bill 2"), Sess. L. No. 2016-3, §§ 1.2–1.3, 2016 N.C. Sess. Laws 2d Extra Sess. 12, 12–13 (repealed 2017). North Carolina's restriction on restroom use was later repealed. According to the National Conference of State Legislatures, in the 2017 legislative session sixteen states have considered passing gender-based restrictions on the use of public facilities. Another six states have considered laws that would preempt localities from enacting protections for transgender persons. And fourteen states have considered adopting public school policies that would limit the rights of transgender students. *See* Joellen Kralik, *"Bathroom Bill" Legislative Tracking*, NAT'L CONF. ST. LEGISLATURES (July 28, 2017), http://www.ncsl.org/research/education/-bathroom-bill-legislative-tracking635951130.aspx [https://perma.cc/7KND-ZCXV].

[8] To date, courts have avoided deciding constitutional claims, focusing instead on the application of anti-discrimination laws. *See, e.g.*, G.G. *ex rel.* Grimm v. Gloucester Cty. Sch. Bd., 822 F.3d 709 (4th Cir. 2016) (evaluating transgender student's restroom access claim under Title IX).

Part II of the Article introduces the concept of "free speech opportunism" and briefly discusses its purported causes and costs. It also describes the related phenomenon of free speech "expansionism," which is the concern that successful free speech opportunism will result in the Free Speech Clause's occupation of territory that rightfully belongs to other areas of law or different constitutional provisions.[9]

Part III turns to the restroom use free speech claim. The example, and the broader tradition of civil rights free speech litigation of which it would be a part, highlight some difficulties with the "opportunism" label. On the surface, a restroom use free speech claim would appear to be quintessentially opportunistic. The constitutional injury is discrimination in access to a public facility or place, based on gender or gender orientation. That sounds like an equal protection issue. However, relative to other available claims, the free speech argument is quite strong. In specific contexts, restroom use would be covered and perhaps even protected speech.[10] Even assuming that there are "proper" invocations of the Free Speech Clause—i.e., those that further its accepted core values[11]—the restroom use claim seems to qualify. Moreover, if successful, such a claim would not produce the kind of opportunism costs critics have identified.[12] In addition, placed in broader historical context, restroom use free speech claims would be part of a long and venerable tradition of entrepreneurial civil rights free speech litigation. Viewed from this perspective, a restroom use claim would invoke the Free Speech Clause synergistically, rather than opportunistically, in order to further *both* free speech and equal protection values. In sum, in this context, the Free Speech Clause may not be a perfect hammer; but it also does not seem like a clumsy pipe wrench either.

Part IV uses the restroom use and civil rights examples to further explore the concept, causes, and consequences of free speech "opportunism." We ought to resist what Justice Cardozo once referred to as the "tyranny of labels."[13] If we are going to use the label "opportunism," particularly in a pejorative way, we ought to do so with precision and care. Whether a particular invocation of the Free Speech Clause is "opportunistic" requires a careful case-by-case analysis that includes a consideration of the context, comparative merit, and likely consequences of each claim. In terms of causes, the Article argues that part of what may be driving resort to the Free Speech Clause is an increasingly activist state that is subject to relatively few federal constitutional limits. Further, we ought to consider not just the potential costs, but also the possible benefits, of invoking the Free Speech Clause entrepreneurially. Ultimately,

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[9] *See* Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199, 1200 (2015).

[10] On the distinction between "covered" and "protected" speech, see Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience*, 117 HARV. L. REV. 1765, 1769 (2004).

[11] *See generally* Weiland, *supra* note 4.

[12] *See infra* Part II.

[13] Snyder v. Massachusetts, 291 U.S. 97, 114 (1934).

critics' focus on the strategic motives of litigants and claimants seems misplaced. The real concern seems to be the substance of free speech doctrines and theories. These create opportunities for entrepreneurial free speech activity. They also raise the specter of an expanding Free Speech Clause that could subordinate and supplant other constitutional rights. Thus, the Article concludes that as between free speech "opportunism" and free speech "expansionism," we ought to be most concerned about the latter.

II. OPPORTUNISM AND EXPANSIONISM

In recent years, a general concern has arisen that litigants are invoking the Free Speech Clause strategically in order to win cases they would likely lose under other rights provisions. Some have argued that litigants are dressing up nonspeech rights claims in free speech garb, in order to reap the benefits of the Free Speech Clause's generous coverage, protection, and influence.[14] Much of the angst concerning this phenomenon relates to commercial litigants, who critics claim have used the Free Speech Clause as a substitute for the Due Process Clause and other constitutional provisions.[15] A related concern, to which the label "expansionism" has been applied, is that successful opportunistic free speech claims will result in the Free Speech Clause colonizing legal and constitutional territory once occupied by other authorities.[16] Commentators have argued that these two phenomena are associated with what I refer to below as "opportunism costs."

A. *Hammers and Pipe Wrenches*

In a 2002 book chapter, Professor Frederick Schauer coined the phrase "First Amendment opportunism."[17] Professor Schauer used a metaphor to explain this concept. "Suppose you need to drive a nail into a board but have no hammer," he asks.[18] "You do, however," he continues, "have a pipe wrench."[19] The metaphorical hammer is a constitutional provision that "fits" the facts and circumstances at hand, and hence provides a proper tool for challenging state action. The metaphorical pipe wrench is the First Amendment—in particular, the Free Speech Clause—which stands in for the hammer and does work it was not designed to do, but which it can accomplish if one applies adequate resolve and force.

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[14] *See* Schauer, *First Amendment Opportunism*, *supra* note 2, at 175–76.

[15] *Id.* at 177–78.

[16] *See* Kendrick, *supra* note 9, at 1200 (describing "expansionism" as the situation "where the First Amendment's territory pushes outward to encompass ever more areas of law").

[17] Schauer, *First Amendment Opportunism*, *supra* note 2, at 176.

[18] *Id.* at 175.

[19] *Id.*

Professor Schauer chose to proceed by way of metaphor rather than definition. A basic dictionary definition of "opportunism" is "the art, policy, or practice of taking advantage of opportunities or circumstances often with little regard for principles or consequences."[20] In this case, the definition essentially tracks the metaphor. Schauer's basic claim is that a wide range of litigants, faced with immediate problems and goals but lacking the right constitutional tool to succeed, have strategically invoked the "plausibly effective but ill-fitting" Free Speech Clause to do the job.[21] In Schauer's view, "[t]he job frequently gets done but, as with driving a nail with a pipe wrench, the job gets done poorly and the tool is damaged in the process."[22] As both the metaphor and definition suggest, the claim is that opportunistic litigants act with little or no regard for the Free Speech Clause's appropriate uses or values.[23] They are motivated primarily, if not solely, by the desire to pound the nail into the board.

Professor Schauer identifies what he claims are opportunistic uses of the Free Speech Clause in several contexts—commercial speech, nude dancing, the U.S. military's "Don't Ask, Don't Tell" policy, and campaign finance regulation.[24] In each area, he claims, litigants have turned to the Free Speech Clause rather than the Due Process Clause, the Equal Protection Clause, or other constitutional provisions that appear to address the core or fundamental harm produced by the relevant legal restrictions.[25]

It is worth noting that many of the nonspeech claims in Schauer's examples do not appear to be very strong on the merits. For example, Due Process Clause doctrine dictates that commercial regulations are reviewed only for "rationality," which typically results in government laws and regulations being upheld.[26] However, Schauer argues that litigants have frequently turned to the Free Speech Clause *even in cases where the Free Speech Clause claim is of no greater merit*.[27] As Schauer puts it, the free speech argument has been "selected as the winner among the array of implausible claims."[28]

B. *Opportunism Causes*

Professor Schauer and others have suggested several possible causes that have led to an upsurge in free speech opportunism. In constitutional litigation

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[20] *Opportunism*, MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/opportunism [https://perma.cc/WB7C-UETV] (last updated Nov. 6, 2017).

[21] Schauer, *First Amendment Opportunism*, *supra* note 2, at 175.

[22] *Id.*

[23] *See generally* Weiland, *supra* note 4.

[24] Schauer also cites free speech arguments by feminists in the antipornography movement as an example. *See* Schauer, *First Amendment Opportunism*, *supra* note 2, at 187 n.52. For additional purported examples of free speech opportunism, see Schauer, *Politics and Incentives*, *supra* note 2, at 1614–16.

[25] *See* Schauer, *First Amendment Opportunism*, *supra* note 2, at 191.

[26] *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 (1938).

[27] *See* Schauer, *First Amendment Opportunism*, *supra* note 2, at 191.

[28] *Id.* at 186.

and public discourse, the Free Speech Clause has what Schauer has referred to as a "magnetic" appeal.[29] Thus, a litigant seeking the "political and rhetorical high ground" is generally well-served by a Free Speech Clause that commands both.[30] In U.S. courts, Schauer observes, freedom of speech is often an "argumentative showstopper[]."[31]

Text and doctrine contribute to this show-stopping quality. Because so many activities involve communication or "speech" in some respect or degree, free speech claims often have a surface plausibility that other constitutional claims do not.[32] As Professor Leslie Kendrick has observed, relatively speaking, free speech doctrine "provides an unusually robust amount of protection for activities that fall within its ambit."[33]

As a result of these general factors, litigants are increasingly turning to the Free Speech Clause, ill-fitting tool that it is claimed to be,[34] for the simple reason that it increases the likelihood their claims will succeed. This, Professor Schauer concedes, is the primary goal in all types of litigation.[35] So long as free speech doctrine continues to develop in ways that expand or at least do not restrict coverage, litigants are likely to continue to look in the direction of the Free Speech Clause.[36]

Professor Schauer identifies a half dozen more specific factors that also may have contributed to the rise of free speech opportunism. First, owing to its magnetic quality, judges, politicians, and public figures may be particularly reluctant to be seen as "against" free speech.[37] Second, free speech arguments might attract "powerful but otherwise ideologically distant allies," which might suggest that the arguments have broad appeal and are based on neutral principles.[38] Third, invocation of the Free Speech Clause might be treated as a patriotic act.[39] Thus, the litigant who invokes the Free Speech Clause might be "like the politician who clothes himself in the American flag."[40] Fourth, First Amendment arguments in general might benefit from the fact that the institutional press, one of their main beneficiaries, has "enormous influence on

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[29] Schauer, *supra* note 10, at 1787–800.

[30] Schauer, *First Amendment Opportunism*, *supra* note 2, at 176.

[31] *Id.*

[32] *See id.*

[33] Kendrick, *supra* note 9, at 1209.

[34] Schauer, *Politics and Incentives*, *supra* note 2, at 1614–16.

[35] *See* Schauer, *First Amendment Opportunism*, *supra* note 2, at 191; *see also* Schauer, *Politics and Incentives*, *supra* note 2, at 1625 ("[M]ost lawyers who raise constitutional claims or defenses do so not out of their own commitment to certain constitutional principles, but rather because they believe that the constitutional argument will increase their likelihood of winning.").

[36] *See* Schauer, *Politics and Incentives*, *supra* note 2, at 1633 (suggesting that recent Supreme Court precedents point in this direction).

[37] Schauer, *First Amendment Opportunism*, *supra* note 2, at 192.

[38] *Id.* at 193.

[39] *Id.* at 192–93.

[40] *Id.* at 193.

public opinion."[41] Fifth, it could be the case that the "cultural penetration" of organizations, including the ACLU, has led political elites to embrace the Free Speech Clause.[42] Finally, the Free Speech Clause may have benefitted from the fact that some of the first to invoke it in the courts—the Jehovah's Witnesses—were generally perceived as posing no serious threat to the established political or social order.[43]

In sum, the cause of free speech opportunism has been traced in part to the unremarkable desire of constitutional litigants to win their cases. However, Professor Schauer and other commentators have also suggested a variety of other social, cultural, and doctrinal causes.

C. *Opportunism Costs*

Commentators have identified a number of what might be called "opportunism costs" that are associated with free speech opportunism. These include the possibility that the Free Speech Clause will supplant or subordinate other constitutional provisions and areas of law. As well, some have expressed concerns regarding the effects opportunism may have on the Free Speech Clause itself.

Adopting and expanding on the opportunism critique, Professor Leslie Kendrick has identified a phenomenon she claims is related to potential misuses of the Free Speech Clause—"First Amendment expansionism."[44] Simply put, expansionism is a product or effect of successful free speech opportunism. It involves colonization by the Free Speech Clause of entire areas of law as well as other constitutional provisions.

As Professor Kendrick explains, when opportunistic speech claims succeed, the "First Amendment's territory pushes outward to encompass ever more areas of law."[45] Judging by recent commentary, including Kendrick's, a primary concern seems to be that as commercial litigants have success invoking the Free Speech Clause, it will occupy more and more of the regulatory landscape. Thus, deregulatory claims that once were brought under the Due Process Clause, the Takings Clause, and other constitutional provisions relating to economic liberty will be recast in the image of the Free Speech Clause.[46]

The possibility that the Free Speech Clause will be the vehicle of economic deregulation is not the only concern. Entire areas of law, from sexual liberty to campaign finance, could come to be governed by the Free Speech Clause. For example, as Professor Schauer has suggested, principles of sexual privacy and

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[41] *Id.*

[42] *Id.*

[43] Schauer, *First Amendment Opportunism*, *supra* note 2, at 193.

[44] *See generally* Kendrick, *supra* note 9.

[45] *Id.* at 1200.

[46] *See id.* at 1207–08 (discussing Due Process Clause and economic liberty); Schauer, *First Amendment Opportunism*, *supra* note 2, at 177–80 (discussing commercial speech coverage).

electoral accountability could be translated into Free Speech Clause concerns.[47] This could result in significant changes in terms of how we debate and regulate a variety of social activities.[48]

Just as areas of law like commercial regulation are subject to free speech colonization, so too is constitutional territory at some risk. As noted, in the economic realm, commentators have expressed concerns that the Free Speech Clause is being invoked as a substitute for the Due Process Clause.[49] In the most extreme case, the Free Speech Clause could expand its territorial reach in a way that supplants most or perhaps *all* other constitutional rights provisions. This could ultimately produce a nontextual, generalized "Free Expression Clause" that governs vast areas of economic and social activity.

In addition to the prospect of expansionism, commentators have identified a number of other potential opportunism costs. According to Professor Schauer, one potential opportunism cost might be the significant distortion of the Free Speech Clause.[50] As he concedes, this presupposes that the Free Speech Clause is not simply the accretion of precedents over time—i.e., the product of numerous common law adjudications—but rather is properly understood to serve particular values or purposes.[51] If, for example, the primary purpose of the Free Speech Clause is to facilitate political discourse and collective self-governance, then opportunistic misapplications—in the area of commercial regulation, or sexual liberty, or what have you—may result in a degree of distortion of the clause's core purposes.[52] In that event, the Free Speech Clause may "lose its ability to perform the function for which it was originally designed."[53]

Professor Schauer also identifies another general cost, namely that Americans will "find ourselves with a cultural understanding of the First Amendment that diverges substantially from what a less misused First Amendment would have produced."[54] At the same time, he allows that it is possible that the Free Speech Clause is "merely the raw material of opportunism and nothing else," in which case free speech opportunism "can no longer be perceived as a problem, but will have told us something revealing about just what the First Amendment is."[55] Again, recognizing this as an opportunism cost depends significantly on whether there is in fact a "legally undistorted idea" of

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[47] Schauer, *First Amendment Opportunism*, *supra* note 2, at 183, 190.

[48] *See id.* at 183 (arguing that free speech opportunism may have the unintended consequence of "moving the First Amendment in such a way that it is taken as the appropriate repository, both in court and in broader public discourse, for the full range of arguments and beliefs about all forms of sexual liberty").

[49] *See, e.g.*, *id.* at 177–78.

[50] *Id.* at 195.

[51] *Id.* at 195–96.

[52] *Id.* at 194–95.

[53] Schauer, *First Amendment Opportunism*, *supra* note 2, at 195.

[54] *Id.* at 176 (footnote omitted).

[55] *Id.* at 195–96.

the Free Speech Clause—something Professor Schauer admits has not yet been established.[56]

Professor Schauer provides some examples of more specific doctrinal distortions that may occur as a result of free speech opportunism. For example, he suggests that the nondeference typically applied to government regulators in free speech cases might be watered down or even reversed in certain cases or areas.[57] Relatedly, Professor Schauer suggests that the tradition of independent appellate review in free speech cases could be weakened as a result of free speech opportunism.[58] It is also possible, he argues, that the strictures of existing categories of "uncovered" speech, including incitement to unlawful activity, will be watered down as they are applied to noncore speech.[59] At the same time, however, Professor Schauer allows that not *all* of these changes are necessarily or inevitably undesirable.[60]

Other scholars have been less ambivalent. One commentator has argued that free speech opportunism could lead to the demolition of the administrative state and the demise of self-government.[61] Another has argued that traditional libertarian free speech theories may not survive the phenomenon of free speech opportunism.[62] A primary concern of opportunism's critics is that the phenomenon will lead to massive deregulation in a number of areas, including business and data privacy.[63] In sum, commentators are concerned that if free speech claims are successful in these and other areas, government will be unable to pursue important public health, safety, and privacy interests.[64]

Despite these potentially serious costs, it is somewhat surprising how ambivalent some commentators seemingly remain about free speech opportunism. Again, at one point Professor Schauer chalks free speech opportunism up to good lawyering—"lawyering in general is opportunistic," he writes, "and necessarily and properly so."[65] More generally, Schauer observes that the term "opportunistic" is one that "hovers precariously between the pejorative and the complimentary."[66] Perhaps most tellingly, he hesitates to refer to any particular invocation of the Free Speech Clause as a "misuse" of the provision. Again, the reason for this reluctance is that such judgments would presuppose what has yet to be established—i.e., agreement regarding what constitutes a "proper" use of the Free Speech Clause.[67]

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[56] *Id.* at 196.

[57] Schauer, *Politics and Incentives*, *supra* note 2, at 1635.

[58] *Id.*

[59] *Id.*

[60] *Id.* at 1636.

[61] *See* Shanor, *supra* note 4, at 206.

[62] *See* Weiland, *supra* note 4, at 1389.

[63] *See* Neil M. Richards, *Why Data Privacy Law Is (Mostly) Constitutional*, 56 WM. & MARY L. REV. 1501, 1507–08 (2015). *See generally* Kendrick, *supra* note 9.

[64] Shanor, *supra* note 4, at 205; Weiland, *supra* note 4, at 1469–71.

[65] Schauer, *Politics and Incentives*, *supra* note 2, at 1625.

[66] Schauer, *First Amendment Opportunism*, *supra* note 2, at 176.

[67] *Id.* at 176–77 n.4.

III. RESTROOM USE AND OTHER CIVIL RIGHTS FREE SPEECH CLAIMS

Having discussed the basic concept, the purported causes, and the possible costs of free speech opportunism, I turn to what I hope will be an illuminating example: free speech challenges to gender-based restrictions on public restroom use. On the surface, this seems like the sort of "opportunistic" free speech claim some scholars might be concerned about. However, the claim highlights some of the potential problems with the opportunism label.

A. *Would the Restroom Use Free Speech Claim Be "Opportunistic"?*

In March 2016, North Carolina enacted the Public Facilities Privacy and Security Act—officially known as "An Act to Provide for Single-Sex Multiple Occupancy Bathroom and Changing Facilities in Schools and Public Agencies and to Create Statewide Consistency in Regulation of Employment and Public Accommodations."[68] The law, which was enacted in response to a Charlotte ordinance that extended anti-discrimination protections to gay, lesbian, and transgender persons,[69] eliminated these protections and prohibited localities from enacting them in the future.[70] In addition, the North Carolina law provided that in government buildings, individuals could only use the restroom or changing facility that corresponded to the sex on their birth certificate.[71] Under the law, transgender persons who did not or were not able to change the gender identity on their birth certificate would have been barred from using the restroom that corresponded to their gender identity.[72]

A group of plaintiffs challenged the North Carolina law, including the restroom access provisions, in federal court. They alleged that the law violated Title IX's prohibition on sex discrimination, the Equal Protection Clause, and the Due Process Clause.[73] Recently, owing in part to actual and threatened boycotts of the state by sports organizations and consumers across the country, the North Carolina law was partially repealed.[74] The restroom provision was part of this repeal.[75] Nevertheless, as noted earlier, many states are considering

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[68] Public Facilities Privacy & Security Act ("House Bill 2"), Sess. L. No. 2016-3, 2016 N.C. Sess. Laws 2d Extra Sess. 12 (repealed 2017).

[69] Steve Harrison, *Charlotte City Council Approves LGBT Protections in 7–4 Vote*, CHARLOTTE OBSERVER (Feb. 22, 2016), http://www.charlotteobserver.com/news/politics-government/article61786967.html [https://perma.cc/BFL4-6EEH].

[70] Public Facilities Privacy & Security Act, sec. 2.1, § 95-25.1(c).

[71] *Id.* at sec. 3.3, § 143-760.

[72] *See id.*

[73] Carcaño v. McCrory, 203 F. Supp. 3d 615, 621 (M.D.N.C. 2016).

[74] Colleen Jenkins & Daniel Trotta, *Seeking End to Boycott, North Carolina Rescinds Transgender Bathroom Law*, REUTERS (Mar. 30, 2017), https://www.reuters.com/article/us-north-carolina-lgbt/seeking-end-to-boycott-north-carolina-rescinds-transgender-bathroom-law-idUSKBN1711V4 [https://perma.cc/MM76-S3GH].

[75] *See* Kralik, *supra* note 7.

adopting laws similar to North Carolina's.[76] And many public school districts are considering adopting policies that would impact transgender students' restroom use in similar ways.[77]

The legal challenge to North Carolina's law did not include a Free Speech Clause count.[78] For purposes of the analysis that follows, I want to assume that some future litigant will invoke the Free Speech Clause, perhaps among other constitutional rights provisions. What reasons might litigants have to pursue a Free Speech Clause claim in this context? Assuming that there are indeed "appropriate" invocations of the Free Speech Clause, is this free speech claim properly characterized as a *misuse* of the clause? What consequences would follow in the event the Free Speech Clause claim was successful?

Recall that "opportunistic" claims are ones that repackage equal protection, due process, and other constitutional claims as free speech claims, primarily in order to convince courts to grant constitutional relief.[79] On the surface, the hypothetical restroom claim seems like a textbook example. The fundamental harm is discrimination in the use of restroom facilities, which is covered—constitutionally—by either the Equal Protection Clause or Due Process Clause. Thus, this seems to be a nonspeech constitutional claim masquerading as a free speech claim. The free speech argument is a "second-best fallback position,"[80] a "pipe wrench" doing a job best left to a "hammer." Invoking the Free Speech Clause in this context would appear to be a strategic ploy to increase the chances of winning the case, rather than an effort to facilitate or advance Free Speech Clause interests or values.

This is a perfectly understandable way to view such a claim. After all, one uses the restroom to relieve oneself, not to communicate anything. If there is any constitutional harm in restricting restroom use, it would not seem to fall under the coverage or protection of the Free Speech Clause. The plaintiff just wants to win her case, and the "pipe wrench" Free Speech Clause might get the job done.

However, this type of claim raises questions about what factors or criteria distinguish "opportunistic" from more appropriate Free Speech Clause claims. Surely it is not sufficient simply to note the facial oddity of connecting restroom use and freedom of speech. After all, at least in the abstract, burning a flag does not seem particularly expressive. But free speech claims are not developed and advanced in a vacuum. They arise in factual, jurisprudential, historical, and political settings that presumably inform the question whether a particular claim constitutes an opportunistic misuse or misappropriation of the Free Speech

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[76] *Id.*

[77] *See, e.g.*, Denise Smith Amos, *Pros, Cons Offered on Duval Schools Bathroom Limits on Transgender Students*, JACKSONVILLE.COM (May 23, 2016), http://jacksonville.com/news/metro/2016-05-23/story/pros-cons-offered-duval-schools-bathroom-limits-transgender-students [https://perma.cc/W65V-ESBL].

[78] *See generally Carcaño*, 203 F. Supp. 3d.

[79] *See* Schauer, *First Amendment Opportunism*, *supra* note 2, at 175–76.

[80] *Id.* at 185.

Clause. Although we cannot know the motives of litigants, these contextual considerations can help us determine whether a particular claim is "opportunistic."

According to opportunism critics, in many cases litigants are *unnecessarily* resorting to the Free Speech Clause. The supposition is that they are choosing the Free Speech Clause over *equally* viable, or *equally* nonviable, constitutional claims.[81] In fact, however, litigants frequently do not choose between claims at all but instead pursue them cumulatively or in the aggregate.[82] Faced with a relatively small menu of constitutional choices, litigants frequently pursue multiple rights claims in the hope that one will ultimately prevail.[83]

In any event, opportunism critics argue that even though it provides no greater degree of assurance that plaintiffs will prevail, the free speech argument is often chosen to do all of the work.[84] So one of the things we would presumably want to know in assessing whether a free speech claim is opportunistic is whether plaintiffs had other equally viable alternative claims. This requires that we somehow measure the relative strength of the claims. Granted, this can be a difficult endeavor. However, to state that litigants are relying on the Free Speech Clause when doctrines are effectively "equal," and in many cases *equally bad*, is to make an empirical claim. Finally, although we cannot discover the motives and purposes of litigants who file free speech claims, we can assess whether their claims would advance principles and values related to the Free Speech Clause as these are presently understood. Opportunistic invocations are, by definition, unconcerned with such values and principles.[85]

What do these factors or criteria tell us about the hypothetical restroom use example? The equal protection and due process claims are not particularly strong. Unless lower courts are inclined to get ahead of the Supreme Court and adopt the view that transgender status is "suspect," or that discrimination against transgender persons is a form of gender discrimination (approaches available to, but not taken by, the Court in *Obergefell v. Hodges*, the Supreme Court's marriage equality decision),[86] litigants are likely to have a very difficult time prevailing on equal protection grounds. Thus, while restricting public restroom facility use based on birth gender certainly sounds like an equal protection harm,

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[81] *See, e.g.*, *id.* at 186.

[82] *See* Kerry Abrams & Brandon L. Garrett, *Cumulative Constitutional Rights*, 97 B.U. L. REV. 1309, 1310 (2017) (discussing "cumulative," "hybrid," and "intersectional" rights claims). *See generally* Michael Coenen, *Combining Constitutional Clauses*, 164 U. PA. L. REV. 1067 (2016) (examining Supreme Court decisions that combine rights to dispose of cases).

[83] Abrams & Garrett, *supra* note 82, at 1310.

[84] *See generally* Schauer, *First Amendment Opportunism*, *supra* note 2.

[85] *See id.* at 176.

[86] *See* Obergefell v. Hodges, 135 S. Ct. 2584, 2602–04 (2015) (invoking the Equal Protection Clause along with the Due Process Clause to support recognition of a right to marriage equality).

equal protection doctrine and precedents may not presently recognize this particular harm or may not provide a sound basis for challenging the restroom limitation. Further, the government's purported interests in public safety and privacy may well provide a rational basis for discriminating based on birth gender in this particular context.

As for the Due Process Clause, *Obergefell*'s opening lines observe that the Constitution protects "a liberty that includes certain specific rights that allow persons, within a lawful realm, *to define and express their identity*."[87] This conception of "liberty" is grounded in the Due Process Clause, but it rests on a connection between self-identification and *expression*. Thus, *Obergefell* does not recognize a fundamental right to self-identify as male or female;[88] however, it may strengthen a free speech claim relating to gender identification. Moreover, although the Due Process Clause protects a sphere of sexual liberty, the precedents in that area speak to intimate decision-making in areas such as private sexual activity and reproductive choice.[89] Although it is related to intimate biological functions, public restroom use seems quite far afield of current privacy jurisprudence. Under current doctrine, courts are not likely to recognize a fundamental right to use the public restroom of one's choice.

By contrast, under existing free speech doctrine the Free Speech Clause claim seems relatively strong. In order to be covered under the Free Speech Clause, the communication or act must constitute "speech."[90] The "coverage" question asks simply whether an act such as choosing and using a public restroom is "speech" within the domain of the Free Speech Clause.[91] When a person relies not on the spoken or written word, but on symbolic acts, to convey her message or idea the Supreme Court has nominally required that (1) the actor intend to communicate some message and (2) an audience is likely to understand the message.[92]

The Supreme Court has itself not always been consistent in terms of applying this standard. Indeed, sometimes the Court does not explicitly apply the standard at all. In several cases, it has simply *assumed* coverage. Thus, burning a draft card as part of a political protest, burning the flag in a similar context, and sleeping outdoors as part of a protest of laws affecting the homeless have all been at least *assumed* to be "speech" properly within the coverage of the Free Speech Clause.[93] Although the Court has warned that it cannot accept the proposition that an infinite variety of conduct will be considered "speech"

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[87] *Id.* at 2593 (emphasis added).

[88] *See id.*

[89] *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 578 (2003) (invalidating state criminal sodomy statute).

[90] *See* Schauer, *supra* note 10, at 1766–67.

[91] *Id.* at 1769.

[92] Spence v. Washington, 418 U.S. 405, 410–11 (1974) (per curiam).

[93] *See, e.g.*, Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 297–98 (1984) (assuming that sleeping outdoors is expressive conduct); United States v. O'Brien, 391 U.S. 367, 376 (1968) (assuming that burning draft card is expressive conduct).

within the meaning of the Free Speech Clause,[94] under the governing standard so long as an act has some communicative aspect or characteristic, then courts are quite likely to answer the coverage question in the affirmative.[95] In other words, the coverage bar is rather low.

Under this doctrine, the claim that gender-based restrictions on restroom use at least *implicate* the Free Speech Clause hardly seems fanciful. The question is not whether a person's use of the restroom—or draft card burning, or flag burning, or sleeping, or stripping—communicates something *in the abstract*. Rather, the question is whether, *in a particular context*, choice or use of restroom intentionally communicates something that an audience is likely to understand.[96] Under this loose, contextualized standard, some transgender plaintiffs can satisfy the Free Speech Clause's coverage requirements.

To make the analysis more tangible, consider the case of a public high school student who is a transgender female—i.e., a biological male who identifies as and desires to live in all respects as female.[97] Her public school has a policy that requires either that the student use the boys' restroom or use a separate unisex restroom. Is the use of the girls' restroom covered speech under the Free Speech Clause?[98] Consider also a facility that is open to the public, and subject to a similar law. Under *Spence*, does the student or member of the public intend to convey any message when she uses the girls' restroom, and is an audience likely to understand what is being conveyed? Or, stated differently, can we at least *assume* that in this particular context use of the girls' restroom has some communicative aspect or characteristic?[99]

Some commentators have analyzed the free speech implications of acts relating to gender identity.[100] Jeffrey Kosbie has addressed the communicative nature of gendered dress and gendered conduct—including restroom use. He

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[94] *O'Brien*, 391 U.S. at 376.

[95] *See* Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos., Inc., 515 U.S. 557, 569 (1995) ("[A] narrow, succinctly articulable message is not a condition of constitutional protection.").

[96] *See Spence*, 418 U.S. at 410–11.

[97] *See* Carcaño v. McCrory, 203 F. Supp. 3d 615, 621 n.1 (M.D.N.C. 2016).

[98] The Free Speech Clause also prohibits government from requiring speakers to convey messages or beliefs they do not agree with or support. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 631–34 (1943). The requirement that the student use the boys' restroom might also compel the communication of a message about gender identity that the student does not wish to convey.

[99] *Cf.* Doe v. Yunits, No. 001060A, 2000 WL 33162199, at *3 (Mass. Super. Ct. Oct. 11, 2000) (granting preliminary injunction against school officials who prohibited a transgender female from wearing female attire or otherwise appearing as female as a condition of enrollment).

[100] *See, e.g.*, Jeffrey Kosbie, *(No) State Interests in Regulating Gender: How Suppression of Gender Nonconformity Violates Freedom of Speech*, 19 WM. & MARY J. WOMEN & L. 187, 187 (2013); Christine L. Olson, *Transgender Foster Youth: A Forced Identity*, 19 TEX. J. WOMEN & L. 25, 34 (2009); Danielle Weatherby, *From Jack to Jill: Gender Expression as Protected Speech in the Modern Schoolhouse*, 39 N.Y.U. REV. L. & SOC. CHANGE 89, 123 (2015).

concludes that dress, appearance, and restroom use can all be considered speech under current free speech doctrine.[101] Kosbie's principal claim is that these actions communicate the social meaning of gender.[102] Audiences that witness gendered acts, such as how a person dresses or which restroom she uses, typically understand that a conception of gender is being conveyed—even if they do not necessarily attach a specific message to particular actions.[103]

As Kosbie observes, communication of and respecting gender is deeply embedded in our social norms concerning masculinity and femininity.[104] When the state mandates that a transgender girl dress as a boy, disciplines a male officer for wearing earrings while off duty, awards child custody to a mother based on concerns about how a child would understand a father's gender transition, or prohibits a transgender female from using the girls' restroom, it suppresses gender nonconformity.[105] In each context, the state is essentially defining what it means to be "masculine" or "feminine." And it is doing so by means of rules and restrictions that suppress communicative actions that defy or dissent from officially prescribed definitions of male and female.[106]

With regard specifically to restroom use, Kosbie observes that "[e]veryone communicates a message of gender identity by using a single-sex restroom."[107] Whether consciously or not, audiences use social norms to ascribe gender meaning to restroom choice just as they do the choice whether to wear a dress or a tuxedo. As Kosbie notes: "Restroom choice is deliberate and intended to communicate a central aspect of identity: 'I am a woman,' or 'I am a man.'"[108]

Current free speech standards do not require courts to accept all of these general observations, much less the gender construction theories that underlie them, in order to conclude that restroom use is communicative. What is necessary is that in a specific case—as, for example, with respect to my hypothetical high school student or member of the public—the use by a transgender person of a particular restroom has a communicative element. For both the student and the member of the public, restroom use may well be "a powerful act of self-definition."[109] When they use a girls' restroom, these individuals intend to communicate gender or femininity. In the context of a controversial school policy that restricts restroom use based on birth gender, the audience of students and administrators is quite likely to understand this

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[101] Kosbie, *supra* note 100, at 205–06.

[102] *Id.* at 206–07.

[103] *Id.* at 200.

[104] *Id.* at 200–01.

[105] *Id.* at 191.

[106] *Id.* at 193–94.

[107] Kosbie, *supra* note 100, at 206.

[108] *Id.* at 243; *cf.* Doe v. Yunits, No. 001060A, 2000 WL 33162199, at *3 (Mass. Super. Ct. Oct. 11, 2000) (concluding that transgender student's "dressing in clothing and accessories traditionally associated with the female gender" was "not merely a personal preference but a necessary symbol of her very identity" that "express[ed] her identification with that gender").

[109] Kosbie, *supra* note 100, at 251.

message. Moreover, if there are negative reactions to the student's use of the girls' restroom, which many transgender persons report,[110] these too may demonstrate that at least some audience members readily understand—indeed, strongly reject—the student's statement of gender nonconformity.[111] A similar context and controversy might also render use of particular public facilities expressive—the user intends to convey a message about gender, and the public may understand that this is the case.

All of this goes to the coverage question. It does not establish that choice and use of a particular restroom is necessarily a form of *protected* speech, either in the context of the high school example or in the more general context of use of public facilities. In the schools context, restroom use restrictions that target the message of gender identity are presumed invalid.[112] Expressive restroom use that interferes with the learning environment could be regulated, but only where there is evidence that the choice of restroom is causing material and substantial disruption.[113] Outside the schools, a court would first determine whether the restroom restriction was in any way related to the communication of a message of gender identity. If so, then a rigorous "strict scrutiny" standard will apply.[114] If not, then an "intermediate scrutiny" standard would be applied to the restroom use restriction.[115] The government's interests in ensuring safety or protecting privacy might be adequate to justify some gendered restrictions on restroom use, but in a particular case a court might also find no evidence to support such interests.

In any event, the coverage argument seems to be *stronger* in these free speech contexts than in the context of equal protection or due process claims. In the event free speech coverage is found to exist, judicial review would be more rigorous than the "rational basis" standard likely to apply under either the Equal Protection Clause or Due Process Clause.

What about opportunism costs? As discussed earlier, some worry that successful invocations of the Free Speech Clause will distort its doctrines or expand its territory in a manner that displaces other legal concepts or

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[110] Jody L. Herman, *Gendered Restrooms and Minority Stress: The Public Regulation of Gender and Its Impact on Transgender People's Lives*, 19 J. PUB. MGMT. & SOC. POL'Y 65, 72 (2013).

[111] Kosbie, *supra* note 100, at 206.

[112] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969) ("In our system, state-operated schools may not be enclaves of totalitarianism.").

[113] *Id.* at 509–10 (discussing disruption requirement and noting that undifferentiated fear is not a valid ground for limiting students' speech).

[114] Pleasant Grove City v. Summum, 555 U.S. 460, 469 (2009) ("[A]ny restriction based on the content of the speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest . . . .").

[115] *See* United States v. O'Brien, 391 U.S. 367, 376 (1968) (announcing an intermediate standard of scrutiny for content-neutral regulations of speech). *See generally* Ashutosh Bhagwat, *The Test that Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. ILL. L. REV. 783, 784 (2007).

constitutional provisions.[116] Neither of these concerns is raised by my hypothetical claims.

As noted, interpreting restroom use to be, or even just assuming it is, expressive would result from application of longstanding free speech precedents.[117] One may certainly take issue with those precedents, as many critics have.[118] However, in the restroom example, invocation of the Free Speech Clause would follow, not distort, applicable free speech doctrine relating to symbolic conduct and content regulation. Nor, in the event such claims were to be successful, is there any danger that the Free Speech Clause would displace the Equal Protection Clause or any other nonspeech provision. As I discuss below, in this context the Free Speech Clause might serve the traditional function of facilitating those nonspeech constitutional claims. In that event, the free speech claims would represent a synergistic, not opportunistic, use of the Free Speech Clause.

Would the free speech claims be opportunistic in the sense that they would not be concerned with, much less serve, any free speech values? No. In fact, the hypothetical restroom use claims implicate, and if successful would serve, *all* of the principal Free Speech Clause values or justifications that courts and scholars have identified.[119] Individual autonomy and self-fulfillment values support gender exploration and the communication of gender identity. Marketplace or truth-seeking values are also implicated by gender nonconformance, which tests principles of gender construction and allows individuals to contest the "truth" of official orthodoxy regarding gender. Perhaps most importantly, given the weight many free speech theorists give to political speech and collective self-government,[120] resistance to gender orthodoxy can be viewed as a form of political dissent. Insofar as laws and policies relating to dress, child custody, and restroom use rely upon gender to distribute public benefits and burdens, they touch upon matters of public concern that are relevant to how gender is to be taken into account by democratic institutions.

It might be tempting to snigger at the notion that restroom use is a *political* concern. However, as one commentator has observed: "From the Industrial Revolution to Jim Crow to women's lib to today, restrooms have been a proxy for political fights on almost every major issue in American life—race, class,

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[116] *See supra* Part II.C.

[117] *See infra* Part III.B.

[118] *See* Kendrick, *supra* note 9, at 1210–12.

[119] *See generally* Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1305 (1998) (discussing principal free speech justifications).

[120] *See, e.g.*, Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 484 (2011).

gender, crime, sexuality, you name it."[121] Thus, "[f]or more than 100 years, Americans have projected their most profound fears about social change onto public restrooms."[122] Southern officials segregated public restrooms by race, police raided public restrooms looking for gay male predators lurking in the shadows, and Phyllis Schlafly warned that equal rights for women meant loss of the private sanctuary of the ladies' restroom.[123] Restrooms, then, are potent symbols of gender, race, sexual orientation, and other forms of political oppression.

Based on the opportunism criteria discussed above, a free speech challenge to a public restroom policy restricting access based on birth gender ought not to be considered a misapplication or misuse of the Free Speech Clause. Judged relative to other rights claims and according to free speech values, such a claim would be stronger and would advance First Amendment values.

B. *Free Speech Litigation and Civil Rights*

Broader contextual concerns may also inform whether a particular free speech claim is opportunistic. Restroom use free speech claims would actually belong to a long tradition of civil rights free speech litigation.

Most of the commentary regarding free speech "opportunism" and "expansionism" focuses on commercial litigants' recent resort to the Free Speech Clause.[124] However, entrepreneurial invocations of the Free Speech Clause long predated this phenomenon. Throughout American history, civil rights activists have frequently invoked the Free Speech Clause in entrepreneurial and enterprising ways. They have leveraged the recognition and exercise of free speech rights to facilitate constitutional movements relating to racial equality, religious liberty, and LGBT rights.[125]

In its early phases, the NAACP's constitutional assault on racial apartheid relied heavily on the Free Speech Clause.[126] The NAACP invoked the Free Speech Clause to challenge application of trespass laws in the context of lunch counter sit-ins, public disorder laws as applied to a silent protest in a public library reading room, restrictions on soliciting clients for the purpose of

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[121] Neil J. Young, *How the Bathroom Wars Shaped America*, POLITICO (May 18, 2016), http://www.politico.com/magazine/story/2016/05/2016-bathroom-bills-politics-north-carolina-lgbt-transgender-history-restrooms-era-civil-rights-213902 [https://perma.cc/H2RL-J5NK].

[122] *Id.*

[123] *Id.*

[124] *See, e.g.*, Schauer, *First Amendment Opportunism*, *supra* note 2, at 177–90.

[125] *See generally* CARLOS A. BALL, THE FIRST AMENDMENT AND LGBT EQUALITY: A CONTENTIOUS HISTORY (2017) (examining the role the First Amendment played in the LGBT rights movement); Timothy Zick, *The Dynamic Relationship Between Freedom of Speech and Equality*, 12 DUKE J. CONST. L. & PUB. POL'Y 13, 14–15 (2016) (discussing the manner in which free speech rights facilitated racial and LGBT equality).

[126] *See generally* HARRY KALVEN, JR., THE NEGRO AND THE FIRST AMENDMENT (1965) (describing civil rights advocates' use of expressive rights to advance racial equality).

litigating civil rights cases, application of state civil libel laws, and demands for the organization's rank-and-file membership lists.[127]

Much like the restroom use example, many of these early challenges appear on the surface to meet the definition of free speech "opportunism."[128] The central harm produced by laws segregating persons by race or singling them out for exclusion based on race was not the denial of freedom of speech, but the denial of equal protection of the laws and basic dignity rights. These are, respectively, Equal Protection Clause and Due Process Clause concerns. As well, the Assembly Clause and the Press Clause would seem more germane to protecting the rights of persons to gather with one another and to publish information. However, doctrines under those nonspeech provisions had not yet fully ripened. Thus, the Free Speech Clause was often invoked in their stead.[129]

In other words, civil rights litigants "repackaged" what were then rather dubious or weak Equal Protection Clause and Due Process Clause claims in equally dubious—or, at the time, perhaps even more questionable—Free Speech Clause wrappers. The free speech claims offered some relief from racial segregation and other aspects of de jure discrimination. The Free Speech Clause was also used to create new organizational expressive rights and to expand freedom of the press. In sum, in a world in which no effective "hammers" were readily available, civil rights litigants frequently reached for the Free Speech Clause "pipe wrench" to seek relief from racial apartheid.

I am not aware of any commentary that characterizes these claims as "opportunistic," suggests that they were inappropriately strategic or cynical invocations of the free speech guarantee, or criticizes them as "misuses" of the Free Speech Clause. To the contrary, commentators have praised the NAACP's free speech strategy as a brilliant, if not wholly successful, means of advancing the twin causes of freedom of expression and—ultimately—racial equality.[130] It would be wrong to treat the Free Speech Clause as an imposter during the civil rights era. After all, the NAACP was seeking to advance the political free

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[127] *See* Brown v. Louisiana, 383 U.S. 131, 142 (1966) (invalidating breach of peace conviction arising from silent and peaceful protest in a public library reading room); Adderley v. Florida, 385 U.S. 39, 46 (1966) (holding that convictions for trespass based on unauthorized protest near jail did not violate First Amendment); Cox v. Louisiana, 379 U.S. 559, 572–73 (1965) (overturning conviction for picketing near a courthouse); Edwards v. South Carolina, 372 U.S. 229, 237–38 (1963) (invalidating breach of peace convictions arising from peaceful civil rights protest); Garner v. Louisiana, 368 U.S. 157, 162–63 (1961) (invalidating breach of peace convictions on procedural due process grounds).

[128] *See* Schauer, *First Amendment Opportunism*, *supra* note 2, at 176.

[129] *See Garner*, 368 U.S. at 162 (arguing that lunch counter sit-ins were expressive); Talley v. California, 362 U.S. 60, 64 (1960) (finding an ordinance requiring identification of publisher "would tend to restrict freedom to distribute information and thereby freedom of expression").

[130] *See generally* KALVEN, *supra* note 126.

speech rights of its members, and of equality advocates more generally.[131] At the same time, it was using the Free Speech Clause to advance its equal protection aims.[132]

During this era, the Free Speech Clause did not colonize or supplant the Equal Protection Clause or Due Process Clause. Rather, it facilitated their elucidation and eventual enforcement. In doctrinal terms, discrimination based on expressive content would eventually come to be policed under the Free Speech Clause, while discrimination based on race and other suspect characteristics would become the domain of the Equal Protection Clause. The situation is a bit more complicated regarding the Assembly Clause and the Press Clause, both of which were cited by the Supreme Court in iconic decisions that also raised Free Speech Clause claims.[133] As discussed below, over time the Free Speech Clause has come to supplant these provisions. But that was not the fault of civil rights litigators, who invoked the Free Speech Clause along with neighboring press and assembly rights.

Civil rights free speech entrepreneurism leveraged the synergies between the Free Speech Clause and other constitutional rights, such as equal protection and due process. LGBT activists picked up where race equality predecessors left off. Owing in part to the thin protections offered to LGBT persons under the Equal Protection Clause and Due Process Clause, they too frequently invoked the Free Speech Clause—even where it did not offer a clear basis for relief. This was particularly the case during the early phases of the LGBT equality movement, when litigants energetically pursued First Amendment claims.[134] Since equal protection and due process hammers were not available, litigants focused instead on establishing rights to openly identify as gay or lesbian, to publish information about sexual orientation, to assemble for expressive purposes, and to come out to employers.[135] Not all of these efforts were successful.[136] And as discussed below, some of them have been criticized as "opportunistic."[137] However, invocation and enforcement of the Free Speech Clause performed a critical function in terms of advancing both the First Amendment and Fourteenth Amendment rights of LGBT persons.

In addition to the doctrinal considerations discussed earlier, this sort of broad context is relevant to an assessment of whether a particular free speech

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[131] *The Struggle for Civil Rights and the First Amendment*, NAT'L COALITION AGAINST CENSORSHIP, http://ncac.org/resource/the-struggle-for-civil-rights-and-the-first-amendment [https://perma.cc/55QA-SZQ4].

[132] *See Garner*, 368 U.S. at 162–63.

[133] *See, e.g.*, Time, Inc. v. Hill, 385 U.S. 374, 389–90 (1967) (citing both the Free Speech Clause and the Press Clause); Edwards v. South Carolina, 372 U.S. 229, 235 (1963) (citing both the Free Speech Clause and the Assembly Clause).

[134] *See generally* BALL, *supra* note 125.

[135] *See id.*

[136] *See* Zick, *supra* note 125, at 30–33 (discussing failed efforts to challenge the Don't Ask, Don't Tell regulations on free speech grounds).

[137] *See infra* note 153 and accompanying text.

claim is "opportunistic." In isolation, a claim that public restroom access bears on the freedom of speech might seem dubious. However, the claim resembles many of the public facilities claims brought by race and LGBT equality activists.[138] It belongs to a long *tradition* of civil rights free speech advocacy in which civil rights proponents sought first to establish expressive identity and other political rights, which they later leveraged into equality and other rights.

IV. "OPPORTUNISM" AND "EXPANSIONISM" REVISITED

My hope is that the restroom use example, and the civil rights free speech tradition of which it would be a part, will help us better understand the concept, causes, and consequences of what critics have labeled free speech "opportunism."[139] If we are going to use this label, which I believe is pejorative, we ought to proceed with caution. In terms of what might be causing the uptick in Free Speech Clause invocations, we need to consider two additional factors: the role of the increasingly activist state and the relative paucity of constitutional provisions that limit its powers. Finally, as to consequences, it is worth considering whether there might be benefits, for both freedom of speech and nonspeech rights, associated with what I prefer to call "entrepreneurial" free speech claims. At the end of the day, we need to identify with precision the actual target or targets of criticism. Although the "opportunism" label suggests a critique of litigants or litigation tactics, it seems to be aimed more squarely at the substance of Free Speech Clause doctrines and the opportunities for expansionism that these doctrines create.[140]

A. *The "Tyranny of Labels"*

In the context of interpreting and applying constitutional principles, Justice Cardozo once warned against the "tyranny of labels."[141] He cautioned that resort to labels has been a "fertile source of perversion in constitutional theory."[142]

Although free speech "opportunism" is not a constitutional theory or principle, Cardozo's caution applies. Critics have developed a descriptive and normative critique of the manner in which a particular constitutional provision—the Free Speech Clause—has been invoked and utilized across a

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[138] *See, e.g.*, *supra* note 127 and accompanying text; *see also* BALL, *supra* note 125, at 62–66.

[139] *See* Schauer, *First Amendment Opportunism*, *supra* note 2, at 176 (defining "First Amendment 'opportunism'").

[140] *See* Kendrick, *supra* note 9, at 1205–06; Schauer, *First Amendment Opportunism*, *supra* note 2, at 176.

[141] Snyder v. Massachusetts, 291 U.S. 97, 114 (1934).

[142] *Id.*

range of different subject areas.[143] Unless we are precise about the factors that give rise to its application, the "opportunism" label cannot tell us which claims are to be treated as illegitimate or problematic. If there are indeed free speech claims that deserve to be called "opportunistic," and if such claims portend the negative consequences some have ascribed to them, it is important that we be able to identify and single them out.

There is a fundamental problem at the core of the opportunism concept. To allege a misuse or misapplication of the Free Speech Clause presupposes the existence of some agreed-upon category of *proper* uses or applications of the clause. However, critics of free speech "opportunism" readily concede that there is no current agreement regarding what suffices as a "proper" invocation of the Free Speech Clause.[144] The absence of such agreed-upon criteria provides an independent reason to be skeptical of the "opportunism" label. Absent such criteria, it may be unfair, if not unjustifiable, to accuse litigants and advocates of exercising bad stewardship over the Free Speech Clause.

Let us assume that traditional core values or justifications—in particular the concerns regarding self-government and protection of political speech—provide the relevant baseline. Let us also assume that litigants who fail to pursue these objectives are acting opportunistically and thus inappropriately. This means that the "opportunism" label is pejorative—a determination that the dictionary definition and most of the commentary on the subject seem to support.[145]

As in other areas of law, there is no shortage of facially silly-sounding arguments in constitutional law. As I have suggested, however, what might look like a silly or frivolous claim on its face can become much less obviously so when considered in its full context. The restroom example, and similar civil rights free speech claims, highlight this lesson. Absent any context, claims that using a public restroom facility, sitting at a lunch counter, or standing in a public library reading room violate the Free Speech Clause seem instrumental and strategic. However, in the context of social and constitutional movements that have relied on diverse forms of communication to contend for equal rights, some or all of those claims appear to be far more principled. Indeed, most if not all of them support or facilitate traditional Free Speech Clause principles and justifications like those just mentioned. Even those that are primarily designed to accomplish nonspeech goals—i.e., to facilitate recognition of equal protection rights—are well within what we might consider the "normal" usages

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[143] *See, e.g.*, Kendrick, *supra* note 9, at 1208–09 (discussing examples of "opportunistic" Free Speech Clause cases); Schauer, *First Amendment Opportunism*, *supra* note 2, at 177–90 (citing cases that invoked the Free Speech Clause).

[144] Schauer, *First Amendment Opportunism*, *supra* note 2, at 176 n.4; *see* Kendrick, *supra* note 9, at 1210–11.

[145] *Opportunism*, WEBSTER'S NEW WORLD DICTIONARY AND THESAURUS (2d ed. 2002) (defining opportunism as "the adapting of one's actions, thoughts, etc. to circumstances, as in politics, without regard for principles"); *see also* Schauer, *First Amendment Opportunism*, *supra* note 2, at 175–76.

of the Free Speech Clause. The claims advance free speech values including self-government, the search for truth, and self-actualization.

When judging whether claims are "opportunistic," we ought to consider the question as holistically and neutrally as possible. Motivations for raising free speech claims are often mixed, and litigants are not driven solely by the desire to win specific cases (although that is certainly one short-term goal).[146] As the civil rights and LGBT examples show, free speech claims may be part of a long-term strategy that combines free speech and nonspeech rights.[147]

Moreover, the "opportunism" label ought not to be applied categorically, to an entire class of claims. For instance, not all "commercial" litigants are motivated solely or predominantly by deregulatory and economic concerns. Indeed, the case that first brought "commercial speech" under the coverage of the Free Speech Clause concerned advertisements for abortion services.[148] The speech in that case both involved a commercial service *and* facilitated the exercise of a newly recognized constitutional right.[149] Thus, even the narrative regarding commercial speech "opportunism" might be more complicated once one digs beneath the surface.

It is also important to carefully—and realistically—assess the possible alternatives that are available to claimants. Use of the label "opportunism" implies that plaintiffs often have *better* options in terms of framing and executing lawsuits but still gravitate toward the Free Speech Clause for strategic reasons.[150] In many cases, the assumption that plaintiffs have many viable—or even equally unviable—options in terms of rights claims seems highly questionable. In some of the examples considered above, arguments based on nonspeech constitutional rights were either weak or all but foreclosed under existing doctrines.[151] Thus, it may not be the case that plaintiffs *prefer* to rely on the Free Speech Clause, rather than other provisions, owing to its cultural salience, so much as it is a reality that most if not all other avenues are either far less viable or simply unavailable. In any event, where more than one rights provision is potentially in play and the Free Speech Clause is among the possibilities, we need to engage in a fair and careful comparison of all plausible claims.

Some critics of "opportunism" do take these sorts of considerations into account. However, sometimes they minimize the strength of the Free Speech

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146 *See* Stephen L. Wasby, *Civil Rights Litigation by Organizations: Constraints and Choices*, 68 JUDICATURE 337, 339 (1985) (describing litigation during the civil rights movement).

147 *See supra* note 125 and accompanying text.

148 *See* Bigelow v. Virginia, 421 U.S. 809, 822 (1975) (invalidating restriction on abortion advertising in part because "the activity advertised pertained to constitutional interests").

149 *See id.*

150 *See* Schauer, *First Amendment Opportunism*, *supra* note 2, at 184–85 (describing the choice to seek to overturn Don't Ask Don't Tell using the Free Speech Clause).

151 *See id.* at 184 (identifying "dubious" constitutional arguments).

Clause argument in ways that suggest a false equivalency with alternative nonspeech claims.

As discussed, one of Professor Schauer's central claims is that litigants are turning to the Free Speech Clause even though the free speech arguments are *just as dubious* as arguments they could make under other provisions.[152] For example, Professor Schauer argues that Free Speech Clause challenges to the U.S. military's Don't Ask, Don't Tell regulations were classic examples of free speech "opportunism."[153] He contends that the essential harm of Don't Ask, Don't Tell (DADT) was not its inhibition of speech, but its denial of equality and due process rights.[154]

Schauer concedes that the plaintiffs were not likely to succeed on equal protection and due process grounds, owing primarily to the fact that the Supreme Court had not recognized LGBT rights under either provision.[155] But he nevertheless maintains that the DADT free speech claims were "doctrinally dubious," in part because the Supreme Court had held that government was permitted to use a person's speech as evidence of a crime.[156] Indeed, he argues that the free speech claims were even more dubious than other constitutional claims plaintiffs did *not* assert—including arguments that the regulations violated the Free Exercise Clause or the Fifth Amendment right against self-incrimination (he does not expound on the merits of these claims).[157]

Schauer contends that the plaintiffs' invocation of the Free Speech Clause was facilitated by the fact that the act of telling is of necessity an act of speech in the literal sense.[158] Primarily owing to this wholly fortuitous circumstance, he argues, litigants strategically turned to the Free Speech Clause as a constitutional substitute for more germane, if again likely ineffectual, constitutional claims.[159] The Free Speech Clause challenges, Schauer concludes, were a "second-best fallback position" chosen to "give sympathetic judges a doctrinal handle and possibly to persuade members of the public as well as the judiciary of the rightness of the claim."[160] Schauer concludes: "What had previously been a doctrinally dubious (even if morally powerful) liberty or equality argument had thus been transformed into a slightly less doctrinally dubious free-speech argument."[161]

That is perhaps the *worst* face one can put on the DADT free speech cases. Indeed, as Schauer acknowledges, other scholars have argued that the free

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[152] *Id.*

[153] *Id.* at 183–87 (arguing that free speech challenges to military's exclusion of homosexuals were "opportunistic" invocations of the First Amendment).

[154] *Id.* at 185.

[155] *Id.* at 184.

[156] Schauer, *First Amendment Opportunism*, *supra* note 2, at 184–86.

[157] *Id.* at 185 (discussing alternative constitutional arguments).

[158] *Id.* at 184.

[159] *Id.* at 185.

[160] *Id.*

[161] *Id.* at 184.

speech claims were "more than slightly plausible."[162] One of the more compelling free speech analyses of these claims was co-authored by Professor William Eskridge and his colleague at the time, Professor David Cole.[163] Eskridge and Cole argued that the government had clearly imposed a penalty on gay service members based solely upon their communications ("I am gay") and expressive acts (including public displays of affection and private sexual conduct), and had thus discriminated against speech based on its content.[164] Under this regime, gay and lesbian soldiers were essentially forced to pretend that they were heterosexual.[165] Under the military regulations, they were prohibited from *discussing* their own sexual orientation or the subject of gay and lesbian rights while at work, in the barracks, or even at home.[166]

Eskridge, Cole, and other scholars argue persuasively that gay identity speech and expressive activities belong within the First Amendment's broad tradition of protection for sexual expression and political dissent.[167] They also argue that protection for gay identity speech is consistent with traditional First Amendment expressive values, that the regulatory justifications invoked by the government were content-based and failed to meet the appropriate level of scrutiny, and that by facilitating expressive chill and heckler's vetoes in military barracks (and elsewhere) the courts were undermining sexual peace and contributing to sexual neuroses.[168] According to these scholars, the fact that the government was using gay and lesbian self-identity as the *sole* evidence of criminal activity was part of the vice of the content-based regulatory scheme, not a justification for an exemption under evidentiary precedents.[169]

My point is not to fully adjudicate the merits of these constitutional claims, but rather to emphasize the need for a fair and balanced review of the relative strength of claims that were available to the litigants and, in particular, the plausibility of their Free Speech Clause claims. Viewed in light of the governing doctrines under the Due Process Clause, Equal Protection Clause, Free Exercise Clause, and Fifth Amendment, it is not clear that these arguments were, as

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[162] *See* Schauer, *First Amendment Opportunism*, *supra* note 2, at 184 n.41 (citing some of the scholarship defending the invocation of the Free Speech Clause in this context).

[163] David Cole & William N. Eskridge, Jr., *From Hand-Holding to Sodomy: First Amendment Protection of Homosexual (Expressive) Conduct*, 29 HARV. C.R.-C.L.L. REV. 319 (1994).

[164] *Id.* at 321–22.

[165] *See id.*

[166] *See* Tobias Barrington Wolff, *Political Representation and Accountability Under Don't Ask, Don't Tell*, 89 IOWA L. REV. 1633, 1644–50 (2004) (providing examples of the scope of the presumption under the military's policy, including application to conversations with family members, sessions with chaplains and psychotherapists, and public statements).

[167] *See* Scott W. Wachs, *Slamming the Closet Door Shut:* Able*,* Thomasson *and the Reality of "Don't Ask, Don't Tell,"* 41 N.Y. L. SCH. L. REV. 309, 320–21 (1996). *See generally* Cole & Eskridge, *supra* note 163 (arguing DADT should be prohibited under the First Amendment because the government is punishing expression not action).

[168] *See* Cole & Eskridge, *supra* note 163, at 321–22, 340.

[169] *Id.* at 337–38.

Professor Schauer contends, "*no different* from the free-speech argument."[170] Indeed, on close inspection, some of them appear to be quite a bit more dubious. Thus, instead of choosing free speech arguments owing to their "cultural salience" or "cultural persuasiveness," litigants could have determined that the Free Speech Clause offered a stronger argument on the merits.[171] Moreover, and importantly, rather than being wholly uninterested in free speech principles and values, DADT litigants were seeking to enforce them.

In assessing the propriety of litigants' resort to the Free Speech Clause in the DADT cases, we ought also to consider the political and cultural environment in which these claims arose. As Professor Eskridge has demonstrated, Don't Ask, Don't Tell was an aspect of a broad governmental effort to impose an "apartheid of the closet" in part through restrictions on gay and lesbian communications.[172] This regime focused on a form of silencing and censorship that sought to render LGBT persons legally and politically invisible.[173] LGBT plaintiffs frequently invoked the Free Speech Clause to challenge such restrictions.[174] As civil rights era plaintiffs had done, they used the Free Speech Clause to facilitate their quest for constitutional equality.[175] The object, in part, was to allow LGBT persons to speak the truth about their sexual identities—which was at the time, and even to some degree today, a form of political dissent.[176]

To be clear, I do not claim that there is no such thing as an "opportunistic" free speech claim, at least as commentators have defined or described that term. My more limited point is that if we are going to use the label, we need to engage in a holistic and neutral examination of the constitutional claims at issue.

B. *Resisting the Activist State*

As discussed earlier, commentators have suggested several causes for the rise in free speech opportunism.[177] Two possible causes that have been largely overlooked are the activism of the state and the relative paucity of federal constitutional provisions that limit its powers.

Behind every purportedly "opportunistic" free speech claim is a governmental action that gave rise to it. Civil rights activists filed Free Speech Clause challenges to invocations of public order, trespass, and business laws that were being used to exclude them or chill their activities.[178] As discussed,

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[170] Schauer, *First Amendment Opportunism*, *supra* note 2, at 185 (emphasis added).

[171] *Id.* at 186.

[172] *See* WILLIAM N. ESKRIDGE, JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 98–137 (1999) (discussing early cases involving speech, association, and press).

[173] *See* BALL, *supra* note 125, at 50–122.

[174] *Id.* at 92–122.

[175] *Id.*

[176] *Id.*

[177] *See, e.g.*, *supra* note 33 and accompanying text.

[178] *See* KALVEN, *supra* note 126, at 123–60.

these claims were part of a systematic constitutional assault on an oppressive racial apartheid.[179] Later, when state and local governments purported to exercise similar authority with regard to where and when LGBT persons could gather together, hold hands, cross-dress, and otherwise communicate their sexual orientation, litigants once again turned to the Free Speech Clause to resist these exercises of purported state police powers.

In the civil rights context, authorities sought to use their regulatory power over public order, access to public spaces, and exercise of rights to enforce systems of racial and sexual apartheid. Playing on people's fears of violence, disorder, and dissent, they relied on traditionally broad police powers to facilitate an official agenda designed to make certain persons invisible—to the law as well as to other citizens.[180] States and other governmental authorities invoked these powers, and the judicial deference that traditionally applied to them, without regard to constitutional principles of dignity, equality, freedom of expression, or other fundamental rights.[181] The Free Speech Clause was frequently used as a means of obtaining at least partial relief from these insidious forms of state activism and *governmental* opportunism.[182]

More recently, states have again turned to their police powers to do some novel and unusual things: to restrict conversations between licensed physicians and their patients concerning firearms; prohibit specified forms of psychological talk therapy; mandate ideological disclosures to women seeking abortions; arrest drivers for flashing their headlights in an attempt to warn others of a speed trap; ban loud noises from public sports arenas; and punish creators of maps and charts for publishing inaccurate information.[183] Further, with regard to the Article's principal example, public restrooms have not always been sex-segregated.[184] Only recently have public authorities deigned to police public restroom use for gender compliance.[185]

In each of these instances, one may seriously question whether it really is "fortuitous," as critics of free speech entrepreneurism argue, that some form of speech or communication is involved. Indeed, the state's dislike or disapproval of what is being communicated by these actions seems in many cases to be the

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[179] *See supra* note 126 and accompanying text.

[180] *See generally* ESKRIDGE, *supra* note 172, at 98–137; MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY (2004).

[181] *See, e.g.*, ESKRIDGE, *supra* note 172, at 98–137.

[182] *See id.*, at 100 ("The image of a neutral law provided just about the only way gays could appeal to an antigay judiciary to protect private gay spaces and the territory of gay subculture, even if episodically.").

[183] Schauer, *Politics and Incentives*, *supra* note 2, at 1614–15 (citing these examples); *see* Wollschlaeger v. Governor of Fla., 848 F.3d 1293 (11th Cir. 2017) (en banc) (physician–patient conversations about firearms); Planned Parenthood Minn., N.D., S.D. v. Rounds (*Rounds II*), 686 F.3d 889, 906 (8th Cir. 2012) (en banc) (abortion-related disclosures).

[184] *See* Ruth Colker, *Public Restrooms: Flipping the Default Rules*, 78 OHIO ST. L.J. 145, 152–57 (2017) (discussing history of sex-segregated public restrooms).

[185] *Id.* at 160–61.

reason for its invocation of regulatory power. State legislatures might think that allowing physicians to discuss firearms safety with patients will convince some of them not to keep firearms in the home—a bad outcome for a "pro-Second Amendment" state.[186] Some legislatures may wish to communicate ideological opposition to abortion rights through mandatory physician disclosures.[187] Others might object to "reparative" talk therapies on the ground that they communicate antiquated notions of sexual orientation as sexual dysfunction. Similarly, lawmakers may object that the boy who identifies as a girl, and thus wants to use the girls' restroom, is conveying something "unnatural" or even dangerous to schoolchildren or other audiences.

Thus, in addition to the list of factors commentators have identified as giving rise to what they contend are ever more frequent invocations of the Free Speech Clause, in areas ranging from sexual morality to regulation of business practices, we should add the fact of state activism and official opportunism. Governmental powers are being used, sometimes in novel or innovative ways, to regulate matters in countless areas of public and private life. The means being invoked are often aimed directly at the communicative nature of the regulated activity.

Against these forms of state activism, constitutional litigants have a rather limited menu of federal constitutional protections to choose from (state menus are generally far more extensive). For most, this menu consists primarily of the enumerated rights in the Bill of Rights, the Fourteenth Amendment's Due Process Clause and Equal Protection Clause, and a smattering of narrowly defined, un-enumerated "privacy" rights. Many of these constitutional rights are "procedural" in nature, in the sense that they define and constrain the process by which governments can arrest, try, or punish individuals. What remains, in terms of substantive rights that limit the exercise of governmental power, is quite limited. Some of the substantive limits, such as the Free Exercise Clause and Equal Protection Clause, have undergone doctrinal limitations that have further blunted their scope and impact.[188] Others, like the Fourth Amendment's prohibition on unreasonable searches and seizures, are useful but only in relatively narrow contexts.

In light of the limited menu of rights provisions, and the *non-fortuitous* fact that many state actions are indeed responsive to communications to which the state objects or are designed to communicate a favored state message, we ought not to be surprised that litigants look to the Free Speech Clause for relief. Rather than assume that constitutional litigants are freely picking and choosing their

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[186] *See generally Wollschlaeger*, 848 F.3d 1293, 1302–03, 1318 (finding state law prohibiting physicians from discussing firearm possession with patients unconstitutional).

[187] *See, e.g.*, Gonzales v. Carhart, 550 U.S. 124, 157 (2007) ("The government may use its voice and its regulatory authority to show its profound respect for the life within the woman.").

[188] *See, e.g.*, Emp't Div., Dep't of Human Res. v. Smith, 494 U.S. 872, 878–81 (1990) (observing that neutral and generally applicable laws are not subject to challenge under the Free Exercise Clause).

constitutional weapons, we ought to consider the possibility that the combination of state activism and limited substantive rights protections may be significantly influencing the nature of these choices.

C. *The Benefits of Free Speech Entrepreneurism*

As discussed earlier, commentators have considered the costs that might be associated with serial strategic invocations of the Free Speech Clause.[189] Some have predicted that misuse or overuse of the Free Speech Clause will damage its core protections for political speech, warp cultural understandings of the Free Speech Clause, and negatively affect certain free speech doctrines.[190] Others have predicted far worse, up to and including the demise of self-government.[191]

We shall have to see which, if any, of these predicted harms will actually materialize. Purportedly opportunistic free speech claims, some of which have been actively pursued for decades, do not appear to have led to dire consequences. In the meantime, we should not overlook the possibility that strategic, enterprising, or *entrepreneurial* invocations of the Free Speech Clause can lead to certain benefits—for both freedom of speech and nonspeech constitutional rights.

As the civil rights example demonstrates, litigating free speech and other First Amendment rights raises the profile of constitutional causes that might otherwise not get much "air time" in American public discourse. The LGBT experience shows that in free speech litigation, even short-term losses can result in long-term benefits.[192] In the short term, losing the DADT and other cases was a blow to the LGBT equality movement. However, in the long term, the movement, like predecessor movements, benefitted significantly from its association with the Free Speech Clause and free speech arguments.[193]

When American society associates activists not with demands for "special" rights or accommodations, but rather with basic free speech rights, their causes become more mainstream. Free speech litigation, much of it admittedly novel and strategic, has assisted groups from the Jehovah's Witnesses, to race equality activists, to LGBT advocates in reaching both public and judicial audiences.[194] Entrepreneurial free speech litigation has propelled and expanded free exercise,

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[189] *See supra* Part II.C.

[190] *See* Kendrick, *supra* note 9, at 1202–06; Schauer, *First Amendment Opportunism*, *supra* note 2, at 193–96.

[191] Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 172 n.46 (2015) (noting that the expansion of free speech protections in commercial speech would make self-governance impossible).

[192] Schauer, *First Amendment Opportunism*, *supra* note 2, at 187.

[193] *See, e.g.*, *id.* (observing that despite failure of Free Speech Clause arguments challenging Don't Ask, Don't Tell, in the long term the LGBT equality movement benefitted from these claims).

[194] *See id.* at 187, 193; *supra* note 127 and accompanying text.

equal protection, and other nonspeech constitutional rights.[195] Among other things, it has created opportunities for actually exercising free speech and other First Amendment rights in ways that facilitate the recognition of nonspeech rights.

This sort of dynamic propulsion can take decades, as litigants press free speech arguments inside and beyond courtrooms. Consider, for example, the process by which the expressive nature of self-identification—including the right to be present and accounted for—has been recognized. At first, only a few Supreme Court justices saw merit in using the Free Speech Clause to adjudicate such claims in the lunch counter sit-in cases.[196] A few Terms later, the Court invalidated the breach of peace convictions of five African-Americans who did nothing more than remain, peacefully and quietly, in a segregated public library reading room after they had been asked to leave.[197] The free speech claim prevailed owing, in part, to the Court's recognition that the activists' *presence* was itself an expressive act of resistance to racial apartheid.[198]

Similarly, consider the notion that a person's sexual orientation is itself expressive—indeed, that in some contexts, it constitutes a form of political dissent. As Professor Nan Hunter has observed, free speech challenges brought during the 1980s and 1990s by gay and lesbian employees and service members "complicated the expression-equality dynamic."[199] During this era, judges simply did not recognize the communicative nature of gay and lesbian self-outing or its relation to equal protection rights.[200] At the time, most courts were not willing to extend free speech coverage and protection to certain forms of sexual dissent.[201] Only as a result of many factors—including social and political changes brought about, in part, by the LGBT community's free speech litigation campaign—did courts finally recognize that sexual identity was a form of political expression.[202] Transgender free speech litigation could lead to the similar understanding that a person's gender is more than a biologically verifiable fact—a notation on one's birth certificate. As transgender speech claims are adjudicated, the relationship between expression and equality rights could develop along similar lines.

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[195] *See* Schauer, *First Amendment Opportunism*, *supra* note 2, at 187.

[196] *See* Garner v. Louisiana, 368 U.S. 157, 201 (1961) (Harlan, J., concurring) (describing sit-ins as a form of speech).

[197] Brown v. Louisiana, 383 U.S. 131, 141–42 (1966).

[198] *See id.*

[199] Nan D. Hunter, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695, 1696 (1993).

[200] *See id.* ("The idea of identity is more complicated and unstable than either simply status or conduct. It encompasses explanation and representation of the self.").

[201] *See id.* (describing the protection of sexual speech as a "radical shift in First Amendment doctrine").

[202] *See* William N. Eskridge, Jr., *No Promo Homo: The Sedimentation of Antigay Discourse and the Channeling Effect of Judicial Review*, 75 N.Y.U. L. REV. 1327, 1398 (2000) ("So long as a minority is truly powerless, the judiciary will not challenge the political process openly.").

As these examples show, entrepreneurial free speech litigation and adjudication helps to inform the scope and substance of equal protection and other nonspeech rights. In other words, invocation of the Free Speech Clause is not always an isolated, abstract event. The clause performs critical functions as it intersects with other constitutional rights. In general, it facilitates rights discourse and mediates, through a well-established free speech framework, public debates about nonspeech constitutional rights. The Free Speech Clause also generally protects the right to communicate about or concerning the recognition, scope, and exercise of constitutional rights.[203] In sum, invoking and adjudicating free speech claims has contributed to our understanding of the meaning of other constitutional rights.

Commentators worry that resort to the Free Speech Clause may distort free speech principles and doctrines.[204] But we should also acknowledge that those principles and doctrines are, in part, the product of entrepreneurial free speech litigation. When it is placed in proximity to and interacts with other rights, including equal protection, the Free Speech Clause is often itself an object of change.

During the civil rights era, for example, Supreme Court precedents recognized speakers' and groups' rights to access certain public properties, established the requirement that government remain neutral with regard to the content of speech, recognized a right of expressive association (and a right of privacy in those associations), and announced that the "central meaning" of the Free Speech Clause is that public debate ought to be "robust, uninhibited, and wide open."[205] These are all central or core elements of our modern free speech jurisprudence. They are also all products of entrepreneurial, if not "opportunistic," free speech litigation.

The question, of course, is whether the benefits of strategic free speech litigation outweigh its costs. We cannot know that without having a better sense of the likelihood that the costs ascribed to free speech opportunism will actually materialize. My point is simply that we ought to at least weigh in the balance the potential benefits from entrepreneurial invocations of the Free Speech Clause.

D. *Refining the "Opportunism" Critique*

I have argued that we ought to approach application of the "opportunism" label with caution. Indeed, throughout the Article I have suggested alternative

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[203] *See generally* Timothy Zick, *Rights Speech*, 48 U.C. DAVIS L. REV. 1 (2014).

[204] *See, e.g.*, Schauer, *First Amendment Opportunism*, *supra* note 2, at 176 (describing the divergence of First Amendment theory due to its misuse).

[205] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); *see* Cox v. Louisiana, 379 U.S. 559, 572–73 (1965) (overturning conviction for picketing near a courthouse); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 462 (1958) (holding that Alabama order requiring NAACP to disclose its membership list violated the group's First Amendment right of association).

ways of describing free speech claims—e.g., strategic, enterprising, entrepreneurial. Part of my discomfort with the label stems from the fact that its criticism seems misdirected. Another difficulty is that the label seems to distract from the most serious potential cost of the activity being critiqued—the wholesale substitution of free speech for nonspeech constitutional rights.

The primary target of the "opportunism" critique seems to be lawyers and litigants, who are the ones purportedly engaged in possible misuses of the Free Speech Clause.[206] In this sense, the critique is misdirected. As noted earlier, critics like Professor Schauer readily acknowledge that constitutional litigation is *naturally* "opportunistic."[207] This partly explains why it is difficult to condemn any particular invocation of the Free Speech Clause as an "abuse" or "misuse" of the clause. In addition, as I have argued, it is not necessarily the case that lawyers and litigants who invoke the Free Speech Clause do so without any regard to development and enforcement of its principles and values, as opposed to some external goal. Many civil rights litigants, including the hypothetical restroom use plaintiff, simultaneously pursue free speech and nonspeech values.[208] Focusing on litigants also raises the specter that certain invocations of the Free Speech Clause are worthy of condemnation or criticism owing to the identity or character of the plaintiff—strippers, political action committees, and especially big corporations are all persistent targets.[209] Finally, irrespective of identity, no plaintiff owes a constitutional or moral duty to the courts or anyone else to forego resort to a constitutional claim that is facially plausible and could provide relief.

It seems that the "opportunism" complaint is better directed at free speech doctrines and theories. Because these things are so capacious and unsettled, litigants have many more opportunities to test and expand the boundaries and meanings of "the freedom of speech."[210] Taking this analytic perspective, Leslie Kendrick has suggested that the difficulty may lie in "the nature of speech and the nature of rules."[211] Opportunism and expansionism persist, she argues, in part because of the simplistic notion that any time *words* are regulated, the Free Speech Clause is in play, and the reluctance or inability of courts and scholars to settle on a rule or guiding principle to cabin the scope of the clause.[212]

Of course, this dilemma is not unique to the Free Speech Clause. Criminal defendants frequently argue for broader definitions of "search" or "seizure"

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[206] *See generally* Schauer, *First Amendment Opportunism*, *supra* note 2.

[207] Schauer, *Politics and Incentives*, *supra* note 2, at 1625.

[208] Colker, *supra* note 184, at 146–52.

[209] *See* Schauer, *First Amendment Opportunism*, *supra* note 2, at 177–87.

[210] *See* Kendrick, *supra* note 9, at 1211; *see also* BURT NEUBORNE, MADISON'S MUSIC: ON READING THE FIRST AMENDMENT 5 (2015) ("Reading the First Amendment isn't easy.").

[211] Kendrick, *supra* note 9, at 1212.

[212] *Id.* at 1212–19.

under the Fourth Amendment.[213] Second Amendment litigants are presently arguing for expansive definitions of what constitutes "arms" and what it means to "keep" and "bear" them.[214] For a few reasons, we may worry more about coverage in the free speech context. First, with regard to the Free Speech Clause, we generally lack some of the source materials that are used to constrain or narrow the language of other provisions. For example, original understandings of the Free Speech Clause are less readily available and thus of less use in the free speech context.[215] Further, and perhaps more importantly, the ubiquity of communicative activity (words) combined with the capacious language of the Free Speech Clause could imperil the pursuit of broad regulatory interests relating to public health, welfare, and safety.

One answer to these concerns is that we entrust judges with the power and discretion to interpret coverage in a way that protects freedom of speech without imperiling the regulatory state. If accurate, reports of the success of free speech "opportunism" are worrisome indeed. But even if there has been a rise in the invocation of the Free Speech Clause across different areas of law, we really do not know, empirically speaking, at what rate or to what degree "opportunistic" free speech claims are actually succeeding. True, as Professor Kendrick and others have observed, courts have recognized certain commercial free speech claims that seem to stretch the Free Speech Clause's coverage and protection.[216] However, courts have also rejected many other enterprising free speech claims. For example, courts have held that the following are *not* covered and/or protected speech in certain contexts: "reparative" talk therapy; physician–patient consultations concerning the possession of firearms; mandatory abortion disclosures; public nudity; and taking photographs or baking cakes for same-sex wedding celebrations.[217] I have argued that there is nothing inherently wrong in pursuing such claims and may disagree with some of these holdings. Regardless, they all represent counter-examples of the purported trend.

If history is any guide, civil rights and other litigants will continue to press the boundaries of the Free Speech Clause. Courts will continue to face challenges in drawing those boundaries in a manner that preserves free speech

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[213] *See, e.g.*, Katz v. United States, 389 U.S. 347, 353 (1967) (holding that electronic eavesdropping constitutes a "search and seizure" within the meaning of the Fourth Amendment).

[214] *See, e.g.*, District of Columbia v. Heller, 554 U.S. 570, 582 (2008) (discussing the Second Amendment definition of "arms").

[215] *See* NEUBORNE, *supra* note 210, at 5–7.

[216] *See* Kendrick, *supra* note 9, at 1207–09; Schauer, *Politics and Incentives*, *supra* note 2, at 1616–17.

[217] *See* Taub v. City of S.F., No. 15-16416, 2017 WL 2294501, at *1 (9th Cir. May 25, 2017) (upholding public nudity ordinance); Pickup v. Brown, 740 F.3d 1208, 1229 (9th Cir. 2013) (treating talk therapy as more like conduct than speech); Planned Parenthood Minn., N.D., S.D. v. Rounds (*Rounds II*), 686 F.3d 889, 906 (8th Cir. 2012) (en banc) (upholding mandatory abortion disclosure law); Elane Photography, LLC v. Willock, 309 P.3d 53, 65 (N.M. 2013) (rejecting wedding photographer's claim that state anti-discrimination law that prohibited discrimination based on sexual orientation compelled speech).

rights while permitting governments to exercise their police and other powers. How things proceed might turn, as Professor Kendrick suggests, on whether courts and scholars can successfully confront the textual and theoretical challenges posed by the Free Speech Clause.[218]

My final point concerning the opportunism/expansionism critique relates to the relative costs of these two related phenomena. As between the two, expansionism poses the greater danger. More precisely, a certain kind of expansionism poses a significant threat to the system of constitutional rights.

Recall that expansionism consists of the colonizing of areas of law or constitutional text.[219] It is one thing to use the Free Speech Clause to facilitate nonspeech rights like equal protection. It is quite another to invoke and adjudicate free speech claims in a manner that results in its supplanting or subordinating various nonspeech constitutional rights. As scholars have observed, the Free Speech Clause has *already* effectively supplanted neighboring provisions including the Press Clause, the Assembly Clause, and the Petition Clause.[220] In a related phenomenon, litigants and courts have invoked and adjudicated free speech claims in ways that have partially supplanted the Free Exercise Clause.[221] In short, the Free Speech Clause has exhibited a tendency to supplant or subordinate certain constitutional provisions. Those provisions then become "ancillary" to the Free Speech Clause, or part of a generalized and nontextual "Free Expression Clause."

We ought to be particularly wary of this particular kind of expansionism. One reason for concern is that it effectively reduces the already limited number of independent limits on governmental action. Textual expansionism undermines the Constitution's pluralistic system of individual rights, which extends constitutional protection outside and beyond the domain of "expressive" activity. The primary danger, then, is not that some "opportunistic" free speech claims will be successful, but that over time invocation and adjudication of those claims will supplant other constitutional rights. As I have noted, that did not occur during the civil rights campaigns. Whether it will occur in other areas, or result from other claims, remains to be seen.

V. CONCLUSION

Critics of free speech "opportunism" decry certain invocations of the Free Speech Clause. Litigants, particularly but not exclusively commercial ones, who

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[218] *See generally* Kendrick, *supra* note 9.

[219] *Id.* at 1200.

[220] *See* JOHN D. INAZU, LIBERTY'S REFUGE: THE FORGOTTEN FREEDOM OF ASSEMBLY 2 (2012); RONALD J. KROTOSZYNSKI, JR., RECLAIMING THE PETITION CLAUSE: SEDITIOUS LIBEL, "OFFENSIVE" PROTEST, AND THE RIGHT TO PETITION THE GOVERNMENT FOR A REDRESS OF GRIEVANCES 4–14 (2012); Sonja R. West, *First Amendment Neighbors*, 66 ALA. L. REV. 357, 357–59 (2014).

[221] *See* John D. Inazu, *The Four Freedoms and the Future of Religious Liberty*, 92 N.C. L. REV. 787, 788–89 (2014).

reframe what seem to be nonspeech constitutional claims as free speech claims are being criticized for doing so. Critics argue that using the Free Speech Clause as a "second-best" basis for relief may harm the clause's core values, diminish existing doctrinal protections, and lead to its unwarranted expansion.

This Article seeks to shift the focus of the debate somewhat. It uses the example of a free speech challenge to public restroom use laws that restrict access based on birth gender. Determining whether such a claim is "opportunistic" is not as simple as it may seem. After careful consideration of the relative merit of all available alternative claims, the historical and cultural context, and the tradition of civil rights free speech litigation, I conclude that it would not be fair or proper to characterize such claims as "opportunistic." That does not mean I think it *preferable* to frame the restroom use claim in free speech terms; only that it ought not to be deemed a "misuse" of the Free Speech Clause.

The example highlights some of the difficulties with the "opportunism" label, which I take to have pejorative meaning. Not least among these is the fact that there is no agreed-upon consensus for what constitutes a proper use, as opposed to a misuse, of the Free Speech Clause. As well, and as critics readily concede, we expect constitutional litigants to use any and all available constitutional claims necessary in order to obtain relief. As the civil rights experience shows, free speech claims that may appear on their surface to be "opportunistic" might be better characterized, after careful consideration, as "enterprising" or "entrepreneurial." These claims are sometimes reactions to activist and opportunistic states, which are using their broad police powers in novel and intrusive ways. Finally, as the civil rights example also demonstrates, free speech resistance can produce benefits both for the freedom of speech and for nonspeech rights like equal protection and due process.

In short, the "opportunism" label carries a normative judgment that is sometimes, if not often, difficult to defend. That is not to say that critics' complaints have no merit, or that there might not be genuine "misuses" of the Free Speech Clause. In that regard, the genuine target of the opportunism critique seems not to be particular litigants or claims, but rather the capacious language of the Free Speech Clause and the inability of courts and scholars to produce a coherent theory or rule to cabin it. Until that occurs, we ought to expect free speech entrepreneurs to enter the void and test the boundaries of the Free Speech Clause. We ought also to expect that they will use the clause as a means of facilitating, advancing, or perhaps resurrecting nonspeech constitutional rights. These are not misuses, but rather traditional functions, of the Free Speech Clause.

As this enterprising litigation occurs, there is one danger or threat that we ought to watch for and guard against. The Free Speech Clause should not subordinate or supplant other constitutional rights. In other words, as between what critics call free speech "opportunism" and what has been referred to as free speech "expansionism," the latter poses the greater threat to constitutional liberty. Whatever short-term benefits may accrue to litigants or movements from

invoking the Free Speech Clause in novel or distinctive ways, in the long run a "Free Expression Clause" is not an adequate substitute for the Constitution's collection of individual rights.